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Supreme Court of the United States

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October Term, 1960.

No. 176

LEONARD SALDANA,

Petitioner,

vs.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY BRIEF OF PETITIONER.

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REPLY BRIEF OF PETITIONER.

Introductory Statement.

The Government, with commendable candor, has suggested to this Court that even if all the legal issues were to be resolved in the Government's favor, the imposition upon petitioner of a twenty-year sentence in lieu of the court-announced five-year term is a matter of "the judicial conscience which is for this Court to resolve in the exercise of its supervisory power." (Respondent's Br. 31.) We respectfully join in this suggestion. We believe that the treatment afforded petitioner in the district court falls far short of "civilized standards of procedure." *McNabb v. United States*, 318 U. S. 332, 340.

Petitioner does not, of course, agree with the Government's contentions as to the legal issues, and it is to these contentions that this Reply Brief is directed. Reply will be made herein only to certain of the issues which are not clearly joined in the briefs previously submitted. On other issues, the respective positions have been adequately stated, and no additional discussion seems required.

ARGUMENT.

I.

Clarification of Facts.

Before discussing the legal issues which we believe merit further argument, we must clarify several factual matters as to which erroneous impressions are created, undoubtedly inadvertently, by the Brief For The United States.

A. The Brief For The United States, states that petitioner's case had been assigned to Judge Hall for trial (at 2, 29). This suggests that when petitioner appeared before Judge Hall on July 29th, there may have been some intention of proceeding with a trial. The record clearly reflects that such was not the case.

When petitioner appeared for arraignment without counsel, Judge Clarke, who was presiding over the master criminal calendar, appointed counsel from the indigent defendant panel. He then suggested that a not guilty plea be entered so that petitioner's case might be tried along with that of Palomino, a co-defendant. Saldana then responded to the Clerk's inquiry by saying that his plea was "not guilty." His case, along with Palomino's, was placed on the trial calendar at a date subsequent to the time Judge Hall was scheduled to take over the master criminal calendar.* Following investigation by court-appointed counsel and full discussion between petitioner and such counsel, petitioner

*This is undoubtedly the event the Government has reference to when it states that petitioner's case was assigned to Judge Hall for trial. However, prior to the date on which Judge Hall took jurisdiction over the criminal calendar, the case was taken off the trial calendar because of petitioner's guilty plea. When Judge Hall subsequently *sua sponte* assumed jurisdiction over the case, it was not pursuant to any order relating to trial or any assignment for trial.

determined to enter a plea of guilty. Counsel then consulted with the Assistant United States Attorney who agreed to accept a plea of guilty to two counts, with the understanding that the three remaining counts would be dismissed. Since Judge Clarke was then still presiding over the master criminal calendar, the change in plea was set for his court by the United States Attorney. [R. 27.]

On June 26, 1958, Judge Clarke accepted pleas of guilty to counts one and two, and announced a five-year concurrent sentence. However, at the Government's request he delayed formal completion of sentencing procedures and formal dismissal of the remaining counts until after the trial of Palomino. Judge Clarke then set the matter for sentencing in *his* court on July 21 [R. 16-17], since it was anticipated that Palomino's trial would be completed by that date. Palomino's case, however, remained scheduled on Judge Hall's calendar for trial. On July 9, Palomino moved, before Judge Hall, for a continuance of his trial. At an *ex parte* proceeding, Judge Hall granted the motion and at the same time, in the absence of petitioner, petitioner's counsel and Government counsel, *sua sponte* transferred petitioner's proceedings to his own calendar.* As the record clearly reflects, petitioner's case was transferred for sentencing not for trial.**

While there is some confusion in the record and the Brief For The United States as to the proceedings

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*The record indicates he did so because he wished to assume jurisdiction over all defendants jointly charged in one indictment, even though one was merely set for sentence while the other was calendared for trial [R. 18, 23].

**"It Is Ordered that co-defendant Cadiana is transferred before this Court for sentence" [R. 4; see also R. 18, 19, 23].

which transpired before Judge Hall on July 21 and 22 (at which petitioner's counsel was not present), the facts are beyond dispute. The co-defendant had obtained a continuance until July 29. Prior to July 21, petitioner's counsel was advised of this, notified that sentencing would be delayed until the date of the co-defendant's trial, and told he need not appear until July 29.* This was the sole reason petitioner's counsel did not appear at the proceedings on July 21 and 22, and the sole reason that the sentencing was continued until July 29. Prior to Judge Hall's actions on July 29, there was never any suggestion made to petitioner's counsel that petitioner's plea be withdrawn.**

*That these are the facts is fully confirmed by the following statement of the Assistant United States Attorney made before Judge Hall on July 22:

> "On this case your Honor, it was on yesterday for sentence and you stated you wanted it brought up this morning and for his attorney to come in with him. I contacted his attorney and didn't get in to see his attorney until after 9:00 o'clock this morning, and he reminded me—and I think it may have slipped your mind yesterday—that both his sentence and the proceedings in the other matter were to be continued.
>
> "His attorney, a man by the name of Stephen Reinhardt, spoke to you very briefly about this case, and you informed us that you were going to continue the sentence on this case until the co-defendant, Albert Palomino, came to trial, that he is due for trial on the 29th of this month, and at that time Mr. Reinhardt asked you if there is any need for him to appear in court on Monday and have you continue the sentence, as he is a court appointed attorney, and you gave him that permission, that he did not need to be in court" [R. 19-20].

**In the proceedings on July 21, Judge Hall stated that petitioner might want to withdraw his guilty plea [R. 18-19]. This statement was made at a proceeding at which petitioner's counsel was not present (having been advised by Judge Hall that the hearing would be postponed until July 29). This statement of Judge Hall was not communicated to petitioner's counsel, and he first learned of it when he received the transcript on appeal.

and there was never any consideration given to such withdrawal by petitioner's counsel or by petitioner.

B. The Brief For The United States (at 29, 44) suggests erroneously that Judge Hall might have had some basis for his vacation of the guilty plea other than the two reasons discussed in the briefs of petitioner and of *amicus curiae*.* Specifically, the Government suggests that Judge Hall may have vacated the plea because there was no probation report in the file, or because he might have felt that the plea was accepted without full compliance with Rule 11, F. R. Crim. P., as to the petitioner's knowledge of the charges and his understanding of the plea. The Government even suggests that perhaps "what Judge Hall meant when he said that the situation had the appearance of a bargain" was the failure to fully comply with the provisions of Rule 11.

Neither contention has any merit. If Judge Hall had felt that a probation report were desirable,** it would have been simple for him to order one. There was no necessity to vacate a plea and send petitioner to trial on this ground. In fact, the vacation of the plea is totally inconsistent with a desire to obtain a probation report.

Nor could any alleged dissatisfaction with a possible failure to comply with Rule 11 have in any way influenced Judge Hall's decision. This is clear for the simple reason that the file before Judge Hall did not

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*The two reasons are (1) the appearance of a bargain, and (2) the quantity of narcotics involved.

**A probation report is not required if the court does not wish one. Rule 32(c)(1); *United States v. Williams*, 254 F. 2d 253, 254 (3rd Cir., 1958).

indicate in any way whether or not there had been full compliance with Rule 11. The file merely revealed that a guilty plea had been accepted. Therefore, the Government's attempt to make Judge Hall's accusation seem more palatable cannot be credited. Judge Hall's statement with respect to "the appearance of a deal" meant just what it seems to mean. He relied on the ground that the court and the court-appointed counsel appeared to have entered into an unethical, if not illegal, arrangement.

C. The Government contends that petitioner's counsel conceded that (1) Judge Hall was not bound by Judge Clarke's announcement of a five-year term and that (2) Judge Hall could have sentenced petitioner to a twenty year term on counts one and two (Respondent's Br. 43). The record does not support either contention. To the contrary the very portion of the record relied on by the Government [R. 28-29] reveals that at the time petitioner's counsel moved that the proceedings be transferred back to Judge Clarke for sentencing, he stated that one of the reasons he was doing so was to "avoid being required" at the time of sentence to request that Judge Hall be bound by Judge Clarke's statement. Further the record reveals that in the same colloquy petitioner's counsel advised Judge Hall that when Judge Clarke announced the five year term "He fixed the sentence". [R. 27.] At no time did petitioner's counsel state that despite Judge Clarke's action, Judge Hall could sentence petitioner to a twenty year term on counts one and two.*

*The statement as to the permissible sentence on these counts referred to in the Brief for the United States (p. 43) related to an entirely different matter. The statement was made in justification of Judge Clarke's decision to accept a plea of guilty to two

II.

The Judgment Should Be Reversed Under the Supervisory Power of This Court Over the Administration of Criminal Justice.

As the Brief For The United States points out, this case presents a fundamental problem—the manner in which criminal justice was administered in the district court. (Respondent's Br. 28-31.) The Brief states that a determination of the legal issues in favor of the United States would not resolve the basic question whether the imposition of a twenty-year sentence by Judge Hall in lieu of the five-year sentence previously announced by Judge Clarke "so departs from the appearance of even-handed justice before a district court of the United States that some relief ought to be granted under the supervisory power of this Court." (Respondent's Br. 31.)

We agree with the Government that this is a matter which this Court must resolve in the exercise of its supervisory power. We urge that had the imposition of a twenty-year sentence by one judge following the announcement of a five-year term by another judge of concurrent jurisdiction been the sole factor in the case, this Court under its supervisory powers would be required to reverse with directions to impose the sentence originally announced. But this is not the sole factor. The imposition of petitioner's quadruple sentence was a direct result of a delay in sentence granted at the Government's request and over petitioner's ob-

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counts instead of insisting that petitioner plead guilty to all five. The statement was made for the purpose of demonstrating that acceptance of pleas on these two counts by no means indicated that any "deal" had been made, since these pleas subjected petitioner to a possible total sentence of forty years.

jections. The delay was for the sole purpose of insuring petitioner's testimony at the trial of a co-defendant—a delay we believe was unlawful. Further petitioner's duly accepted pleas of guilty were vacated over his objections and he was then subjected to the ordeal of trial on these counts. Under these circumstances we urge that the exercise of this Court's supervisory power is even more clearly required.

Moreover, this Court's supervisory power over the administration of criminal justice is not limited in this case to the sentencing question. There is an even more fundamental question raised with respect to the nature and effect of guilty pleas. At page 34 of the Brief For The United States, it is argued that when a defendant pleads guilty to certain counts and other counts are dismissed by the court, the defendant may subsequently be re-indicted and tried on the counts which have been dismissed. Thus, the Government argues that there is no such thing as a binding agreement to accept a plea to a lesser number of counts even though the court has approved the agreement and taken all action required to execute it. In the instant case, this contention is particularly significant since petitioner is not here merely relying on an understanding reached between the court-appointed counsel and the Assistant United States Attorney. Petitioner is relying on the action of Judge Clarke in adopting that agreement by judicial action when he accepted the pleas.

In view of the Government's contentions, we urge that this Court under its supervisory power over the administration of criminal justice should affirm the universal long-standing practice of court-approved settlements of criminal charges. Unless this Court holds

that a dismissal of certain counts upon conviction by plea of guilty on other counts constitutes a bar to re-indictment on the counts dismissed, this universal long established practice will be cast aside and defendants will no longer have any incentive to enter pleas of guilty. If this Court upholds the contention of the Government, the administration of the criminal law in the district courts will be drastically affected and the usefulness of the guilty plea as a tool in administering that law will be destroyed. Since more than 80 percent of criminal cases are currently disposed of by pleas of guilty, the effect of this ruling upon the trial calendar would be felt very quickly.

III.

This Court Should Decide the Question Whether the Postponement of Sentencing Violated Petitioner's Rights.

The first question presented in petitioner's petition for writ of certiorari, and the first issue treated in petitioner's brief, was the unlawful delay in sentencing. The Government, however, has chosen not to reply to this issue on the merits but to rely solely on the proposition that it need not be reached. In view of this, we need not reiterate the reasons why the delay in this case violated petitioner's rights. We will, however, rebut the Government's suggestion that it is unnecessary for this Court to consider the question.

The Government contends that the delay in sentencing pertains only as to counts one and two, since those were the only counts on which petitioner was to be sentenced. Hidden in this argument is a semantic exercise which entirely overlooks the facts of the case and the realities

of the administration of criminal law. The court delayed not only the formal imposition of sentence on counts one and two but also the formal dismissal of counts three, four and five.

The postponement constituted one act. The consequences to petitioner were disastrous. There can be no contraverting the fact that the imposition by Judge Hall of a sentence four times as long as that announced by Judge Clarke was a direct and proximate result of the postponement of sentencing. Therefore, even if it be assumed that the provisions of the Sixth Amendment and Rule 32(a) F. R. Crim. P. are applicable solely to the court's action with respect to counts one and two, the question of the propriety of the delay cannot be avoided; for petitioner is entitled to relief from all prejudice suffered as a result of that delay.

Petitioner urges a further reason why the Sixth Amendment and Rule 32(a) are applicable. We believe that these provisions are applicable to the court's action of June 26, 1958 with respect to all five counts. The postponement of action on counts three, four and five until after the co-defendant's trial was just as improper as the postponement of action on counts one and two. Under the circumstances of this case, petitioner was entitled to have all five counts finally disposed of on June 26, 1958.

Rule 32(a) requires that sentence be imposed without unreasonable delay. We contend that Rule 32(a) is applicable to counts which are to be dismissed at time of sentence as well as to counts on which punishment is to be imposed. Clearly, both such dispositions are part of the sentencing proceedings. However, even if counts to be dismissed were not subject to Rule 32-

(a), they would be subject to the provisions of the Sixth Amendment. For, as we have urged in petitioner's brief (at 17-19), the Sixth Amendment right to a speedy trial includes sentencing proceedings and, indeed, the entire prosecution of a criminal case.

For the above reasons, this Court should determine whether the delay for the purpose here involved was proper.

IV.

The Brief for the United States Ignores the Nature and Legal Effect of Compromise Pleas.

As has been stated above, there is an important place in the criminal law for the disposition of criminal charges by plea of guilty. As an essential part of this system, the compromise of charges has long been accepted by the courts. Such a system gives more than adequate protection to the public interest—particularly in narcotics cases, in view of the 5-year mandatory minimum sentence without possibility of parole, the severe maximum sentences permissible, and the multiplicity of offenses involved in each transaction. In the instant case, the acceptance of the compromise plea on two counts left Judge Clarke with the discretion to impose a total term of forty years.

The Brief For The United States analyzes the legal problems involved in a totally mechanical manner. The Brief treats counts three, four and five as if they had no relation to the guilty pleas entered on counts one and two. The Brief does not deny that petitioner pleaded guilty to these two counts with the understanding that the remaining three counts would be dismissed. Nor does it deny that the court in fact gave judicial

approval to this compromise of the charges by accepting the plea to counts one and two. However, it argues that counts three, four and five remained totally unaffected by this judicial action. It urges that counts three, four and five were subject to trial and that the legality of petitioner's trial thereon must be considered, "wholly apart" from the actions taken with respect to counts one and two. With this position, we are in total disagreement.

We urge that the validity of Judge Hall's actions with respect to counts three, four and five must be considered in the light of the previous actions of Judge Clarke. The fact that a compromise plea was accepted cannot simply be disregarded. We believe that the acceptance of a plea on two counts constituted a judicial settlement of all five counts. Therefore, the Government's attempt to treat counts three, four and five "wholly apart" from the court's actions with respect to counts one and two is contrary to fundamental principles of law and justice.

What the Brief For The United States overlooks is the fact that Judge Hall did not merely order petitioner to trial on counts three, four and five. Rather, he purported to vacate a judicial disposition of all five counts. We cannot now mechanically separate and retroactively re-order Judge Hall's action to fit the present purposes of the Government. He did not, as the Brief For The United States now suggests, determine to subject petitioner to trial on counts three, four and five and then, out of concern for petitioner, vacate his pleas to counts one and two. Judge Hall instead jumped to the conclusion that there was "an appearance of a deal," and on this basis he vacated the entire five-count

disposition. Further, as the Brief For The United States concedes (Respondent's Br. 25, 41), it would have been unfair to petitioner to subject him to trial on counts three, four and five so long as his pleas of guilty to counts one and two remained in effect. Therefore, under the Government's own theory, no trial could have been held on counts three, four and five unless the vacation of counts one and two was lawful. For this reason alone, the Government's attempts to treat counts three, four and five "wholly apart" from counts one and two must fail.

The Government also relies on the technical contention that counts three, four and five had not been formally dismissed. (Respondent's Br. 23, 33.) While this contention is not necessary to its basic argument that a dismissal of some counts as part of a court-approved settlement of an entire indictment does not bar further prosecution of the counts dismissed (Respondent's Br. 34), we believe it requires reply. It is true that no formal dismissal order was entered as to counts three, four and five. However, for the purposes of this case, Judge Clarke's action with respect to counts three, four and five was tantamount to a dismissal. For, as the Government concedes, it would have been unfair to convict petitioner by plea on counts one and two and to require him to stand trial on the remaining counts.

Therefore, the technical question of the formal entry of a dismissal becomes immaterial. The real problem, as the Government recognizes, is whether the pleas on counts one and two were lawfully vacated. If not, the conviction upon those pleas barred any further prosecution on counts three, four and five.

V.
The Vacation of the Guilty Pleas Was Contrary to Law.

Petitioner has urged that a District court has no authority to vacate a duly accepted plea of guilty over a defendant's objection. (Petitioner's Br. 22-27.) Our study of that portion of the brief of the Government which is directed to this question (Petitioner's Br. 42-49) serves only to confirm this view.

The Government does not rely on the common law power of a district court to reconsider judgments during the term of court, since the Government concedes that such power has been abolished by the Federal Rules of Criminal Procedure. Rather, the Government relies on a purported inherent power of the court to reconsider its decisions in a case which has not yet been concluded. While we might concede *arguendo* with respect to civil cases or with respect to rulings during the course of criminal trials that there is an inherent power to modify rulings, this rule is not applicable to one who has been placed in jeopardy, legal and actual, by a conviction. The case has been concluded insofar as conviction is concerned, and the court has no further power with respect to conviction except upon motion of the defendant. (Pet. Br. 26-27.)

The Government bases its contention that there is a power to vacate upon the wholly unsupported assertion that this power is a necessary incident to the "long recognized control of a court over its proceedings." (Resp. Br. 46.) It is readily demonstrable that the purported power to vacate as long as a case is "pending before a court" (Resp. Br. 46) did not exist as late as 1946. This Court has held that federal courts have no

authority to vacate, *sua sponte*, convictions for the purpose of ordering new trials after the expiration of the time during which a defendant may make such a motion.*. The rationale of that decision is equally applicable to the vacation of guilty pleas *sua sponte*. Until 1946, defendants convicted by plea of guilty were not permitted to move for withdrawal of such pleas more than ten days after their conviction (Rule II (4), Criminal Rules of 1933) even though sentence had not been imposed at the end of the ten-day period and the proceedings were still pending before the court. Thus, under the *Smith* rationale, even if there had been any power in a federal court to vacate pleas *sua sponte*,** this power would have terminated not later than ten days after the entry of the pleas—even though sentence had not been imposed and the proceedings were "still pending" before the court.

Therefore, we submit that the power to vacate pleas *sua sponte* while the proceedings are "still pending" is not comprehended within any long standing or well recognized rule as to the plenary power of a court—and certainly no such power should now be implied. This is particularly true where so doing would be in deroga-

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United States v. Smith, 331 U. S. 469, discussed *infra*. This Court there expressly avoided the question whether any such power exists even during the time a defendant could make such a motion. However, it said that the assertion of any such power would raise serious questions of double jeopardy. Although *Smith* involved a vacation *sua sponte*, the vacation was greatly desired by the defendant who argued before this Court that the trial court had the power it asserted.

**While *Smith* involved the power of the court to vacate a conviction under an express Federal Rule relating to new trials (Rule 33 F. R. Crim. P.) the Government does not make any contention that the purported vacation here involved was authorized under any Federal Rule.

tion of the long established right of defendants to be free from successive prosecutions for the same offense.

The Brief for the United States also urges that the court has unlimited discretion under Rule 11, F. R. Crim. P., to accept or reject guilty pleas. We do not believe this is the case. We believe that, once the court determines that an offense has actually been committed and that the plea is voluntarily, intelligently and knowingly entered, a court must accept a plea of guilty and would abuse its discretion if it required a defendant to stand trial merely because it believed his offense was a serious one. (See *Adams v. United States ex rel. McCann*, 317 U. S. 269.) However, regardless of the nature of Rule 11, there is no corollary discretion with respect to vacating pleas once accepted—and the Government offers no precedent for its suggestion that there is such a corollary. The reasons underlying the distinction between the acceptance and vacation of guilty pleas have been fully discussed in petitioner's brief. (*e.g.*, pp. 25-27.)

The Government argues that Judge Hall was justified in vacating the pleas because of the amount of narcotics involved. We do not believe that this is the time to argue the question whether there was or was not a large amount of narcotics involved in this case.* Nor do we believe that this matter is a proper basis for vacating a plea of guilty—or even for determining whether to accept a plea of guilty. The Brief Of The United States states at pages 29, 40 and 42 that the

*We should point out, however, that the amount of narcotics involved cannot be measured by the number of ounces set forth in the indictment since one ounce of pure heroin may contain far more narcotics than 15 ounces of the finished product which persons like petitioner ultimately deliver to purchasers.

amount of narcotics involved justified Judge Hall's action. That brief says:

> "He also found that the amount of heroin involved was very large and his feeling was that, on such a serious charge, the facts should be fully developed before a jury—in other words, that there should either be an acquittal or a consideration of the sentence on the basis of all the facts." (Respondent's Br. 29.)

This argument makes no sense to us. In determining whether a defendant is guilty or innocent, the sole question is whether he in fact committed a violation of the law. The amount of narcotics involved is wholly immaterial to the question of determination of guilt. The appropriate time for consideration of this factor is at the sentencing proceedings. There is no reason why more serious felonies should be tried by juries while less serious felonies may be disposed of by convictions upon pleas. Nor do we know how many ounces of narcotics (pure or otherwise) must be involved before a defendant is required to face the ordeal of trial in lieu of exercising his normal right to plead guilty.

The suggestion that the facts can only be developed at a jury trial is absurd on its face. The court's power to determine facts at sentencing proceedings is far greater than its power to do so during the course of a criminal trial. In fact, the court is not bound by the ordinary rules of evidence when conducting sentencing proceedings. The court may often rely on the report of a probation officer which may be based entirely on hearsay. See *Klingstein v. United States*, 217

F. 2d 711, 713 (4th Cir. 1954). We agree that Judge Hall was influenced in taking his action by the quantity of narcotics involved. However, we feel that not only is this not a justification for his action, but rather that it points up its unlawfulness.

The Government argues that the vacation of petitioner's plea was to petitioner's advantage. In the first place, this is a matter for petitioner and his counsel to decide. In the second place, this argument assumes a basic question in this case—namely, whether counts three, four and five could properly have been tried if counts one and two had not been vacated. We think it is clear that they could not.*

We hope there will be no misunderstanding created by the Government's suggestion that the vacation of the pleas was in the best interests of the defendant. Here again the Government takes a mechanical approach to the law which is far removed from realities and fundamental concepts of justice. Judge Hall vacated not only the pleas of guilty but also repudiated the court approved disposition of all the criminal charges contained in the indictment. He did this not because he felt it to be in the interests of petitioner, but because he was not satisfied with another judge's disposition of

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*Another argument of the Government is that the vacation of the pleas was "in the interests of justice" (Brief for the United States, 26, 44). This general allegation adds nothing to the specific grounds discussed above. It is in fact a conclusion that one or more of those specific grounds justified the vacation.

the case. The Government does not deny that Petitioner, the Assistant United States Attorney and the court all believed that the guilty pleas on counts one and two were intended to constitute a disposition of all five counts. In fact, its brief states "the guilty pleas had been entered on the assumption that petitioner would not be tried." (Respondent's Br. p. 44.) The Government does not deny that the judge who accepted the pleas announced and intended that a five-year sentence be imposed. Under the circumstances, we believe that the subsequent repudiation of this court-approved disposition, and the imposition of a sentence four times as long (following the subjection of petitioner to the ordeal of a totally unwarranted trial) violates the standards of this Court for the administration of criminal law in the federal courts.

Finally, we must emphasize that the basis for Judge Hall's action, as the record clearly reflects, was his unsupported and arbitrary charge that it appeared that Judge Clarke and court-appointed counsel had made a deal. Despite the Government's efforts to find an acceptable rationalization for Judge Hall's act, none can be found.

VI.

Petitioner's Trial Subjected Him to Double Jeopardy.

The Government concedes that had petitioner been sentenced on counts one and two, he would have been placed in jeopardy on those counts. (Respondent's Br. 49.) The Government then urges, however, that until sentence is actually imposed, jeopardy does not attach. Petitioner's brief, however, demonstrates that jeopardy attaches upon the plea. (Petitioner's Br. 34-39.)

The Government urges alternatively that, even if jeopardy did attach upon petitioner's plea, jeopardy was removed upon vacation of that plea. For this proposition, it relies on *Kercheval v. United States*, 274 U. S. 220. *Kercheval* involved a plea which had been withdrawn by a defendant. It in no way stands for the proposition that jeopardy may be removed over a defendant's objection for the purpose of subjecting him to a second prosecution.

The Government attempts to rationalize its conclusion that a defendant's jeopardy may be removed over his objection by analogizing the instant case to one in which a defendant is placed on trial but a mistrial is declared prior to any conviction. We think the distinction is apparent. By pleading guilty, a defendant irrevocably subjects himself to punishment. By contrast, in the case of a trial the defendant merely has been placed n some risk of eventual conviction.

Due to the complex problems inherent in any criminal trial, there is always the possibility that events over which the court has no control may prevent the completion of the prosecution in a manner which will be

fair to the defendant. For example, a juror may die, the judge may become ill, or the defense attorney may for some reason be unable to continue with the trial. This is far different, however, from a situation in which a defendant has actually been convicted, whether by trial or by plea.

A closer analogy would be a trial in which after conviction the court decides that error was committed. The defendant, however, is satisfied with the conviction and does not wish to request a new trial at which he might receive a heavier sentence. Under these circumstances, we do not believe that the court could after conviction order a mistrial or a new trial over the defendant's objections.

Moreover, the power to declare a mistrial without the consent of a defendant is justified only where "extraordinary reasons" exist. *Wade v. Hunter*, 336 U. S. 684. The power to subject a defendant to a second trial in these emergency situations constitutes a very narrow exception to the double jeopardy rule. Further, this Court has recently granted certiorari in *United States v. Gori*, cert. granted 354 U. S. 917, a case which raises serious questions with respect to the exercise of any such power. We do not believe that there can ever be any justification for extending the exception to the double jeopardy rule to post-conviction situations—and certainly if such an extension is to be made there are no circumstances here present which justify doing so in the instant case.

The Government cites cases which stand for the proposition that a defendant may be convicted at one trial on separate counts for separate offenses arising out of a sale of narcotics. *Blockburger v. United States*,

285 U. S. 299; *Gore v. United States*, 357 U. S. 386. The Government also cites cases which stand for the proposition that a defendant may be convicted at one trial on separate counts for the offense of conspiracy and for the separate substantive offense of committing an unlawful act pursuant to that conspiracy. *Pereira v. United States*, 347 U. S. 1. With these principles of law, we need not quarrel.

We do urge, however, that a different rule is applicable in a case in which the Government first obtains a conviction (by plea or trial) for one of the offenses involved and subsequently attempts to convict the same defendant at a separate trial for acts which should properly have been tried at the first proceeding. The necessity for the application of a different rule is, as we stated in petitioner's brief (at 42), made clear in the excellent opinion of Judge Friendly in *United States v. Sabella*, 272 Fed. 206 (2nd Cir. 1959).* His view is shared by the American Law Institute and by legal writers (Petitioner's Br. 43). In this connection, we believe that there can be no doubt that petitioner was placed once in jeopardy by his conviction upon plea of guilty. We urge that his conviction on counts one and two barred any *subsequent* proceeding on counts three.

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*The Brief for the United States attempts to distinguish *Sabella* on the grounds that the defendants in that case had commenced serving their sentences. However, since the court held that the sentences were illegal, it was not the service of the sentence which placed the defendants in jeopardy. The court specifically stated that the jeopardy in *Sabella* stemmed from a conviction upon plea of guilty—and not from the service of sentence. The Brief for the United States also attempts to distinguish *Sabella* on the grounds that that case involved two indictments while the instant case involves only one. However, this distinction is meaningless. The evil involved is the multiple prosecution and the ordeal of a subsequent trial following the first conviction. Whether this subsequent trial is based on a second indictment or on a portion of but one indictment is wholly immaterial.

four and five. However, this case presents an even more persuasive argument for application of the double jeopardy rule than would the ordinary case involving multiple trials for related offenses; for here we have a subsequent trial for unlawful acts which were expressly included within a conspiracy count on which petitioner had previously been convicted.

Petitioner has urged that, following his conviction by plea of guilty, the Double Jeopardy Clause barred vacation of that plea and also barred a subsequent trial on counts three, four and five. Petitioner has also urged that regardless of the applicability of the Double Jeopardy Clause, the district court had no power to vacate the pleas and subject petitioner to trial—or in the event that some such power exists, that the district court abused its discretion. It is beyond dispute that a serious question exists as to the applicability of the Double Jeopardy Clause. For this reason alone, this Court should hold that the district court acted beyond its authority—or in abuse of its discretion—when it vacated the pleas and ordered petitioner to trial.

Constitutional questions must be avoided when there is a reasonable construction of a non-constitutional power which would permit the court to avoid reaching them. In this case, the reasonable construction would be to hold that the district court exceeded its power or abused its discretion when it purported to vacate petitioner's pleas.

The case of *United States v. Smith*, 331 U. S. 469, cited by the Government, is directly applicable. In *Smith*, the question was whether a district judge could vacate a conviction and order a new trial *sua sponte* after the time during which he could have taken such

action at the defendant's request had passed. This Court first pointed out that permitting a judge to vacate a conviction *sua sponte* would raise serious questions of double jeopardy, "For it is (the defendant's) request which obviates any later objection the defendant might make on the ground of double jeopardy" (331 U. S. 474). This Court then held that the district court had no power to vacate the conviction after the time during which petitioner would have requested such action. In so doing it stated that a sufficient reason for reaching this conclusion would be to avoid the question of double jeopardy which would otherwise have arisen.

Smith said, "that a serious constitutional issue would be presented by such a procedure is enough to suggest that we avoid a construction that will raise such an issue". (331 U. S. 475.) In the instant case, we urge that this Court avoid the construction of the district judge's power suggested by the Government since such construction raises the double jeopardy issue.*

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*The Brief for the United States suggests that petitioner has waived his right to assert double jeopardy. This is just not the case. Petitioner objected to the vacation of the pleas and reiterated his objection to the holding of the trial and to that vacation immediately prior to the commencement of the trial. While it is true that the words "double jeopardy" were never specifically spoken, petitioner urged that the court had no authority to subject him to the trial because of his previous conviction by plea. This clearly and sufficiently raised the double jeopardy issue. Further, the double jeopardy issue was fully briefed and argued before the Court of Appeals and was expressly decided by that court [R. 105]. At no time prior to its brief on the merits filed with this Court has the Government ever suggested that the double jeopardy issue was not properly raised. Finally the suggestion of waiver must fail in view of "this Court's own oft-repeated admonition that the courts must 'indulge every reasonable presumption against waiver of fundamental constitutional rights.'" *Emspak v. United States*, 349 U. S. 190, 198. See, also, *Johnson v. Zerbst*, 304 U. S. 458, 464; *Glasser v. United States*, 315 U. S. 60, 70, and *Smith v. United States*, 337 U. S. 137, 150.

The Government's attempt to distinguish the *Petite* case (361 U. S. 529) on its facts is totally unconvincing. No such distinction can be made. (Petitioner's Br. 44-45.) Nor do we agree that the fact that a district judge urged the prosecution requires the Government to withhold application of the *Petite* rule in this Court. We are persuaded that the rule is indeed applicable, and should be adopted by this Court under its supervisory powers. Otherwise, the constitutional question of double jeopardy is squarely raised.

Petite requires that offenses to which the rule is applicable be "alleged and tried together." The Government insists that the offenses here involved were in fact "alleged and tried together." Concededly, they were *alleged* together. But they were not *tried* together. Petitioner was convicted on counts one and two by pleas of guilty entered and accepted on June 26, 1958. Petitioner was then subjected to a separate trial on counts three, four and five in August of 1958.*

Merely charging related offenses in one indictment does not reach the reason for the rule against multiple prosecutions. The reason for the *Petite* rule is not to preclude separate indictments but to proscribe separate attempts to obtain convictions for related offenses. We understand the purpose of the *Petite* policy to be the protection of defendants against the ordeal of addi-

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*For the purposes of this discussion, it is immaterial that counts one and two were again tried in August of 1958 along with counts three, four and five. The contention of the Government is that "wholly apart" from the June 26 conviction on counts one and two, the Government had the legal right to order a subsequent trial on counts three, four and five. The question here involved is whether, following the conviction on counts one and two, it was proper to hold a separate trial on the remaining counts.

tional trials once convicted of an offense which is a part of the same transaction. Under this rule, the Government could not obtain one indictment in eight counts and hold two separate trials, each on four counts. This would be multiple prosecution. So too is the conviction of a defendant upon plea of guilty on a portion of the counts and his subsequent subjection to a separate trial on the remaining counts.

VII.

The Court's Rulings Re Examinations of the Informer Singh Denied Petitioner a Fair Trial.

The Government contends that there is no such thing as a witness hostile *ab initio* and that hostility can be determined only by the witnesses' answers to questions. Petitioner contends to the contrary. *E.g.*, see *Meeks v. United States*, 179 F. 2d 319 (9th Cir. 1950), in which the court held that it was proper for the Government to treat its principal witness as hostile *ab initio*.

The Government cites in support of its contention *Stevens v. United States*, 256 F. 2d 619 (9th Cir. 1958). In *Stevens*, however, the court pointed out that the rule that the party calling a witness cannot impeach him except upon a showing of surprise was subject to much criticism,* and held the rule inapplicable to the case before it.

The Government contends that it was not obliged to call Singh as a witness "merely because he was an in-

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*Compare III Wigmore on Evidence (3rd ed. 1940) §899: "There is no substantial reason for preserving this rule,—the remnant of a primitive notion"; Model Code of Evidence (American Law Institute 1952), p. 119: ". . . [A] rule which has had the disapproval of commentators and thoughtful judges, and which has no reason but history to support it. . . ." The Model Code abolishes the prohibition against impeaching one's own witness. Rule 106.

formant." We agree. Petitioner, however, was obliged, in a very practical sense, to call Singh as a witness. The Court clearly indicated that if petitioner did not call Singh as a witness, it would instruct the jury to presume that Singh's testimony would have been unfavorable to petitioner.*

As a result petitioner was placed in an untenable position. Whether or not he called Singh as a witness, Singh was to be deemed "petitioner's witness." If petitioner did not call Singh, then the court would give the "material witness" instruction against petitioner. On the other hand, when petitioner did call Singh, petitioner was not allowed to treat him as hostile.

The unfairness of this is particularly apparent when it is realized how closely Singh was tied to the Government. Singh was a special employee of the Government [R. 46]; had refused, upon the advice of the Assistant United States Attorney, to discuss the case with petitioner's counsel [R. 84-85]; and was a recent user

*See the lengthy colloquy between the trial judge and defense counsel [R. 73-75]. Judge Hall first stated that he would not give the instruction (on failure to call a material witness) against the Government, because he did not feel that the testimony which the informer could offer was material to the Government's case. He then said that it was up to petitioner's counsel to determine whether or not Singh's testimony was material to petitioner's case. Counsel replied that it was material. Subsequently, the following ensued:

"Mr. Reinhardt: Just to be clear on this, what instruction would your Honor give, would you say?

"The Court: Well, I don't intend to give any at the present state of the case. You may want to call him or you may not. The Government may then want me to give the instruction as to the witnesses that are available to either side; and if one has testimony *which you consider material*, and you fail to call him, in that event it would be against you. So you've got to make up your mind whether or not you are going to call him." (Emphasis added.) [R. 74-75.]

of narcotics, an offense for which he had not been prosecuted by the Government. [R. 83, 86.]

Under these circumstances, it was essential that petitioner be allowed to cross-examine and impeach Singh.

VIII.

The Denial of Petitioner's Motions for Judgment of Acquittal With Respect to Count 5 Was Improper.

The Government's contentions that a sale took place as comprehended by the 5th count of the indictment are without merit. Both petitioner and the Government start with the proposition that the word "sells" is used in 21 U. S. C. §174 in its "ordinary and popular sense". (Resp. Br. 58; Pet. Br. 58.) The Government somehow concludes from this proposition that "whether there has been a sale, therefore, does not turn on niceties of title that have been developed in the law of sales." (Br. 58.) The Government thus confuses the quality of having an ordinary meaning with the quality of having a pliable meaning.

The Government does not, and cannot, contest the proposition that one indicted for a sale under a statute proscribing sales should only be convicted for selling. While the Government criticizes any dependency on niceties of title, it does not make any clear statement as to what elements constitute a sale. If we were to take at face value the Government's quotation from *Hatch v. Oil Co.*, 100 U. S. 124 that "[n]othing was required at common law to give validity to a sale of personal property except the mutual assent of the parties to the contract," then the alleged sale by petitioner to Licuanan and Segura would have been consummated

prior to the time petitioner had any control over the narcotics involved.*

The Government subsequently changes position somewhat and contends that "what is required is simply an agreement of the parties to transfer property plus an appropriation of the property to that end." (Resp. Br. 58.) The Government cites no authority for this latter proposition and gives no explanation as to why the fact of appropriation should make any difference. Of all the crimes proscribed by 21 U. S. C. §174, the act of selling is normally considered to be the most serious. The conduct which Congress was proscribing was the act of transferring narcotics from one person to another. There is no indication that Congress wanted to brand as a seller one who merely appropriated goods for contract, but failed for one reason or another to complete the proposed transaction.

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*The *Hatch* case in no way supports the Government's position. *Hatch* recognizes, as the Government refuses to do here, the difference between an executory contract of sale and a sale. The portion of the opinion in *Hatch* which immediately follows the sentence quoted by the Government states:

> ". . . As soon as it was shown by competent evidence that it was agreed by mutual assent that the one should transfer the absolute property in the thing to the other for a money price, the contract was considered as completely proven and binding on both parties. If the property by the terms of the agreement passed immediately to the buyer, the contract was deemed a bargain and sale; but if the property in the thing sold was to remain for a time in the seller, and only to pass to the buyer at a future time or on certain conditions inconsistent with its immediate transfer, the contract was deemed an executory agreement. Contracts of the kind are made in both forms, and both are equally legal and valid; but the rights which the parties acquire under the one are very different from those secured under the other. . . ." (100 U. S. 130-131.)

We think it essential that criminal statutes not be construed so as to make persons guilty of crimes merely because they indicate a willingness to commit them. The true test of criminality comes when the would-be criminal is put to the test-namely, whether he will go through with his contemplated offense. In this case our contention may not be particularly appealing since petitioner had previously completed three sales to Licuanan. However, the rule here adopted is equally applicable to all—and there are many who will not go through with the transaction, even if only at the very last moment. We do not believe that these persons should be branded as sellers and convicted of that offense, regardless of their preparatory actions, until they actually complete the sale.

In short, it must be recognized, as the Court of Appeals recognized, that no sale had taken place as of the time Licuanan pulled his gun and placed petitioner under arrest. If petitioner, immediately prior to Licuanan's act, had announced to Licuanan that he had changed his mind and would not complete the transaction, the Government would hardly contend that the sale was then complete. If the sale would not be complete under those circumstances, it was not completed under the circumstances of this case at the time Licuanan placed petitioner under arrest. Similarly, it must be recognized, as the Government seems to recognize, that no sale was concluded after Licuanan pulled his gun and placed petitioner under arrest. (Pet. Br. 58-59.) In view of this, the *corpus delicti* of the offense was not established, and the motions for judgment of acquittal as to count five should have been granted.

IX.

The Entrapment Instruction Was Improper.

With respect to petitioner's contention that the entrapment instruction misstated the burden of proof, the Government first contends that the point is not open to petitioner here in view of Rule 30 of the Federal Rules for Criminal Procedure. However, the Government does not cite any authority to indicate that Rule 30 precludes review of an instruction given by the trial court where, as here, a proper instruction was submitted to the court. The instant case falls within the purview of *United States v. Balodimas,* 177 F. 2d 485 (7th Cir. 1949), in which the Government urged a failure to comply with Rule 30. The court, in reversing the trial court, pointed out that:

> ". . . The record shows that the court informed counsel that he was going to give the instruction in controversy in place of the one proposed and that counsel might have an exception, which was noted. This may not be a strict compliance with the rule, but it is not easy to discern what more counsel for the defendant could have done under the circumstances . . ." (P. 488.)

The circumstances which the court set forth in *Balodimas* are exactly those of the instant case. [R. 100-101; 142.]

The Government further contends that in any event the charge was adequate. In support of this contention, the Government quotes from the entrapment instruction itself. However, that instruction misstates the burden of proof. (Pet. Br. 62-63.) Otherwise, the Government points only to that portion of the charge

which states that the burden is on the Government to prove "every material element in the offense" beyond a reasonable doubt. However, the instruction subsequently lists expressly the elements of the offense, and these elements, as listed, do not include, and make no reference to, the entrapment defense. [R. 138-139.] Nowhere in the charge is there any proper allocation of the burden of proof as to that defense.

Conclusion.

The Brief For The United States concludes by requesting that the judgment of the Court of Appeals should be affirmed. We believe, however, that the more significant portion of that brief is that which appears at page 31 where the Government states that it will discuss only the legal issues, and will not comment on whether the judgment should be reversed by this Court under its supervisory power over the administration of criminal justice. We urge that this Court should reverse on the basis of that power—and alternatively we urge that this Court should reverse on the basis of the other legal arguments presented by petitioner. For these reasons we submit that the relief previously requested in petitioner's brief (pp. 63-68) be granted.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 176.—October Term, 1960.

Leonard Saldana, Petitioner, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[April 3, 1961.]

Per Curiam.

The petitioner was convicted on four counts of a five-count indictment charging offenses under the narcotics laws. 21 U. S. C. § 174. He complains of a number of alleged trial errors. In addition, he points to a series of events occurring during the course of the prosecution which, he says, operated to deprive him of constitutionally guaranteed rights. It is unnecessary to detail here the course of those proceedings, since we are advised that a change in the calendar system of the District Court for the Southern District of California insures that what occurred in this case will not occur again.

During oral argument in this Court the Solicitor General suggested that the combination of circumstances in this case, beginning with one judge's clearly expressed intention to impose a five-year sentence, and ending with another judge's imposition of a twenty-year sentence under the indictment, was not consistent with that regularity and fairness which should characterize the administration of criminal justice in the federal courts. In the light of the Solicitor General's suggestion, and upon an independent examination of the record, we have concluded that a due regard for the fair administration of justice requires that the convictions under counts 3, 4, and 5 of the indictment be set aside. 28 U. S. C. § 2106; see *Communist Party* v. *Subversive Activities Control*

Board, 351 U. S. 115, 124; *Mesaroch* v. *United States*, 352 U. S. 1, 14; *Marshall* v. *United States*, 360 U. S. 310. Cf. *Petite* v. *United States*, 361 U. S. 529. The conviction under count 2, to which the petitioner originally pleaded guilty, is affirmed.

Because of this disposition of the case, we do not reach for consideration the alleged trial errors with respect to limitation of cross-examination, sufficiency of the evidence of a "sale" under count 5, and instructions to the jury as to entrapment.

So ordered.